

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 594 OF 2007

Baliram Madhukar Dalvi,) Appellant
Convict No. 10514, Age) (Original
45 years,) Accused No.3)
Circle : 1/7 YCP, Pune-6.)
(Through Jail)

Vs.

State of Maharashtra) Respondent

Kum. Rebeca Gonsalves, advocate appointed for
appellant.

Smt. U. V. Kejariwal, APP for the for
Respondent.

CORAM : SRI R.M.S. KHANDEPARKAR &
SRI A. A. SAYED, JJ.

DATE : DECEMBER 5, 2007.

ORAL JUDGMENT [Per Sri R.M.S. KHANDEPARKAR, J.]

. This is an appeal filed from jail by a
person who was made to face the trial without
assistance of any lawyer or any sort of legal
aid before the Sessions Court, in spite of full
knowledge about the same to the concerned

presiding officer of the Sessions Court as well as the learned prosecutor before the Sessions Court. The appellant has been convicted under Section 302 of I.P.C. and has been sentenced to undergo imprisonment for life and to pay fine of Rs. 2,000/-, in default to suffer rigorous imprisonment for six months.

2. The appellant was sought to be charged under Section 302, 323, 120-B read with section 34 of I.P.C., on the ground that he along with three others on 10th February 1997 at about 5 p.m. within the limits of village Mhasewadi, taluka Manegaon, district Raigad, in furtherance of common intention committed murder by intentionally or knowingly causing death of one Shankar Babu Shelar and voluntarily causing hurt to Chandana Chandrakant Shelar. The charge in that regard was framed by Shri S.D. Mohod, then Sessions Judge at Raigad-Alibag in Sessions Case No. 96 of 1997 on 14th February 1998. The appellant was in fact arrested on 13th February 1997 itself. The appellant pleaded not guilty to the charge. Recording of evidence commenced on 20th April 1998. The prosecution examined 9

witnesses and the recording of last witness was concluded on 17th July 1998, while same judicial officer was presiding over the Sessions Court Raigad all throughout. By judgment dated 15th February 1999, the same Sessions Judge acquitted other three accused, while convicting the appellant herein under Section 302 of I.P.C.

3. The appellant preferred appeal through Jail. When the same came up for hearing on admission 24th August 2007, as the appellant was not represented by the advocate, the registry was directed to appoint an advocate from the panel of advocates prepared for legal aid service. Accordingly Shri Rajan Salvi advocate came to be appointed as advocate for the appellant from the legal aid pannel. The matter was thereafter fixed for admission on 5th October 2007. Accordingly, when the matter came up for hearing on 5th October 2007, none appeared for the appellant. Since the record disclosed that Shri Rajan Salvi, advocate, was appointed and as he had failed to appear for the appellant, the office was directed to appoint Kum. Rebeca Gonsalves to represent the

appellant. Matter was then adjourned to 19th October 2007.

4. When the matter came up for hearing on 19th October 2007, since the R & P was received at that time, in order to enable the advocate for the appellant to go through the said record, at her request the matter was adjourned to 26th October 2007, on which date the matter was again adjourned at the request of learned advocate for the appellant to 20th November 2007. When the matter came up for hearing on 20th November 2007, the learned advocate for appellant pointed out certain serious irregularities in the trial before the trial Court, and therefore, we found it necessary in the interest of justice to fix the matter for final disposal at the admission stage itself, and the matter was fixed for this date i.e. today and the matter has been heard accordingly.

5. Taking us through the records particularly the roznama sheets before the Sessions Court, the evidence recorded before the Sessions Court, the plea of the appellant

recorded before the Sessions Court and the impugned judgment, the learned advocate for the appellant submitted that the court below in total disregard to the mandatory provisions in relation to the procedure to be followed in cases where accused is not represented by an advocate in Sessions trial, without giving proper opportunity to the appellant of availing necessary legal assistance and proper representation by an advocate, concluded the trial, thereby totally flouted the basic principle of natural justice, resulting in great prejudice to the appellant. Placing reliance in the decision of the Apex Court, in the case of **Suk Das and another Vs. Union Territory of Arunachal Pradesh, reported in AIR 1986 Supreme Court 991 = 1986 Cri.L.J. 1084,** she submitted that it is the fundamental right of an accused in Sessions Case to have free legal aid service and the same having been denied, the impugned judgment should be declared bad in law and the appellant should be acquitted in the matter. Further drawing our attention to the rules regarding Legal Aid to unrepresented person in cases before the Sessions Court framed in the

year 1982 in terms of the provisions of Section 304 of Cr.P.C. 1974, she submitted that there has to be accountability for the lawyers who are appointed on legal aid service to represent unrepresented accused persons. Once a lawyer is appointed to represent such accused person, if he fails to perform his duty by remaining absent when the matter comes up for hearing, there should be some penalty prescribed and their names should be struck off from the legal aid pannel. She further submitted that in order to attract better quality work by the lawyers appointed under legal aid pannel, time has come for reviewing the remuneration which is paid to such lawyers for the services rendered by them under legal aid services. The fees which are fixed in the year 1997 cannot be said to be just and proper in the year 2007 and the same need to be reviewed. In that regard, attention was sought to be drawn to the decision of the Madhya Pradesh High Court, in **Sagri Vs. State of Madhya Pradesh**, reported in **1991(1) Crimes 580**.

6. The learned APP on the other hand fairly conceded that in terms of the statutory

provisions, the appellant was required to be provided with the legal assistance and that in that regard there was complete failure on the part of the Sessions Court. She however, submitted that in spite of such failure, it cannot be said that there is prejudice caused to the appellant to such an extent that he should be straight way granted acquittal on that ground. She has also drawn our attention to the fact that though the accused was not represented by the advocate, he was offered opportunity to cross-examine the witnesses, but the same opportunity was not availed of by the appellant. Besides, even at the time of recording of the plea, the appellant was specifically asked as to whether he wanted to engage an advocate at the cost of the Government and the appellant had specifically refused to avail the said facility. Under these circumstances, according to the learned APP, there is no scope to contend that any injustice has been caused to the appellant, on account of absence of advocate to represent him before the trial Court.

7. Section 304 Cr.P.C. deals with the

subject of legal aid to the accused at State expenses in certain cases. Sub-section (1) thereof provides that "where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expenses of the State". The provision of law therefore, clearly provides that it is the duty of the court to assign the pleader for the defence of an accused in a Session Case, where such an accused is not represented by a pleader. The legal assistance to unrepresented accused in a Sessions Case is therefore, his statutory right and undoubtedly it is an obligation of the Session Court to ensure that there is due compliance of such right of the accused before he is tried and convicted.

8. Sub-section (2) of Section 304 provides that, "the High Court may, with the previous approval of the State Government, make rule providing for-

a) the mode of selecting pleaders for
defence under sub-section (1);

b) the facilities to be allowed to such
pleaders by the Courts;

c) the fee payable to such pleaders by
the Government, and generally, for
carrying out the purposes of sub-
section (1)".

9. Accordingly the rules were framed being
LEGAL AID TO UNREPRESENTED ACCUSED PERSON IN
CASES BEFORE THE COURT OF SESSION RULES, 1982.
In terms of Rule 3 thereof, the legal aid shall
be given to every unrepresented accused person
entitled to such aid in a case before a Session
Court. Rule 4(1) thereof provides that "the
Presiding Officer of the Court shall explain to
every unrepresented accused person, the
provisions of the Rules of Legal Aid as soon as
he is produced before him for the first time and
shall certify under his signature the fact of
having done so in the record of the case to that
effect". Sub-rule (2) thereof provides that the

Presiding Officer shall ascertain whether the unrepresented accused person is desirous of availing of free legal assistance. Sub-rule(3) provides that, "no unrepresented person shall be compelled to avail of free legal assistance against his wish". Sub-rule (4) thereof provides that, "the Presiding Officer of the Court shall, at the time of awarding sentence of imprisonment or imprisonment in default of payment of fine acquaint the convict of his right of appeal and right to get the Legal Aid for preferring an appeal.

10. The provisions of law as comprised under Section 304 of Cr.P.C. read with above referred Rules obviously disclose a duty has been cast upon the Session Court to ensure that unrepresented accused is provided with necessary legal assistance. Undoubtedly such legal assistance cannot be thrust upon the accused person against his will. Nevertheless proper reading of Rule 4 above in its entirety would disclose that it is not sufficient for the Session Court merely to inquire at the time of recording of the plea as to whether he would

like to avail the legal assistance. Even in a case where the accused person declines to avail the legal assistances while recording the plea in an answer to the charge framed in a Session Case, if in the course of the recording of the evidence the accused remains unrepresented, or is found to be without any legal assistance, certainly it is the duty of the Session Court to enquire as to whether the accused needs any legal assistances to be provided in terms of the said rules read with Section 304 Cr.P.C. Failure on the part of the Session Judge in this regard would certainly result in denial of statutory right guaranteed to the accused person in a Sessions Case. Besides, result of denial of legal assistance would also result in violation of constitutional mandate under Article 21 of the Constitution of India. The fact that the Session Judge has taken due precaution in that regard and has duly complied with the provisions of law relating to the legal aid to the unrepresented accused must be apparent from the records.

11. The Apex Court in **Suk Das & Anr.**

(supra) while taking into consideration the earlier decisions in M. H. Hoskot's case as well as Hussainara Khatoon's case held thus-

It is now well established as a result of the decision of this Court in Hussainara Khatoon's case (1979)3 SCR 532 : (AIR 1979 SC 1369) that "the right to free legal service is ... clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held to be implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of

the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer". This Court pointed out that it is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal service available to him. The same view was taken by a Bench of this Court in **M.H. Hoskot V. State of Maharashtra, (1978) 3 SCC 544: (AIR 1978 SC 1548)**. It may therefore now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure

prescribed by Article 21. Of course, it must be recognised that there may be cases involving offences, such as, economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal service may not be provided by the State. There can in the circumstances be no doubt that the appellants were entitled to free legal assistance at State cost when they were placed on peril of their personal liberty by reason of being accused of an offence which if proved would clearly entail imprisonment for a term of two years....."

Having observed above, the Apex Court has further ruled that-

"it is this absence of legal awareness which is responsible

for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advice in time and their poverty magnifies the impact of the legal troubles and difficulties when they come. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant: they cannot even help themselves. The law ceases to be their protector because they do not know that they are entitled to the protection of the law and they can avail of the legal service programme for putting an end to their exploitation and winning their rights. The result is that

poverty becomes with them a condition of total helplessness.

This miserable condition in which the poor find themselves can be alleviated to some extent by creating legal awareness amongst the poor. That is why it has always been recognized as one of the principal items of the programme of the legal aid movement in the country to promote legal literacy".

12. The above observations clearly highlights the need for Sessions Judges to be alert and conscious about their obligations to ensure that the mandate of Section 304 Cr.P.C. read with the said Rules is complied with in letter and spirit. Unless the Sessions Judge takes proper steps to ensure legal assistances to unrepresented accused persons, it would lead to total injustice to such person, as the trial would go undefended on his behalf, and that is what has happened in the case in hand. If one peruses the evidence recorded in the case in

hand, it discloses that after the cross examination on behalf of accused Nos. 1, 2 and 4 there was no cross-examination of the witnesses on behalf of appellant who was accused No.3. At the end of the cross-examination by and on behalf of accused Nos. 1, 2 and 4 of every witness, we find a note recorded to the effect that "cross examination by accused - declined". This obviously discloses that at no point of time during the trial, the appellant was asked as to whether he would like to have legal assistance in terms of the said Rules and Section 304 of Cr.P.C. by the Sessions Judge. Merely because accused had declined to cross-examine, that would not lead to conclusion that he had refused to take the legal assistance.

13. The contention that such offer was made at the time of recording the plea, undoubtedly is borne out from the record as the plea of the appellant discloses that he, at the time of recording of the plea, was asked whether he desired to engage any advocate at the cost of the government and he had declined the same, but

the same record discloses that at the relevant time, the appellant was represented by one advocate Bandiwadekar, who declined to represent the appellant on conclusion of cross examination of the first witness on behalf of the accused Nos. 1, 2 and 4. The withdrawal by the advocate for the appellant was in fact in the course of recording of evidence, and there is nothing on record to disclose that the Sessions Judge had any time thereafter enquired with the appellant as to whether the appellant would like to engage any other advocate or that he would like to avail the services of the advocate at the costs of the government. It clearly discloses the failure on the part of the learned Sessions Judge to perform his duties in terms of Section 304 read with the said Rules. Undisputedly, it was also the obligation of the learned Public Prosecutor in the case before the Sessions Court to bring it to the notice of the Sessions Judge and in that regard there was also failure on the part of the learned Public Prosecutor to perform his duties.

14. On account of non availability of legal

assistance, none of the witnesses which are examined by the prosecution were cross-examined on behalf of the appellant. Thus, the defence on behalf of the appellant never came before the Session Court. In other words, Session Court had no occasion to hear the defence on behalf of the appellant in an answer to the charges levelled against him. The entire case has been decided without considering the defence on behalf of the appellant. In the circumstances, the impugned judgment is to be held having been passed totally contrary to and in violation of the provisions of the law, while denying the basic statutory right guaranteed to the accused persons. At the same time, it is a matter of record that the accused had been in jail since 13th February 1997 till this date.

15. Section 386(b) of the Code of Criminal Procedure clearly provides that "in an appeal from a conviction the appellate court can certainly in setting aside the judgment of conviction and sentence, either acquit or discharge the accused or remand the matter for re-trial to the court of competent

jurisdiction". Undoubtedly these powers are to be exercised judiciously and not arbitrarily. It is equally true that appellant was subjected to the prosecution on accusation of commission of murder. Nevertheless as already observed above, the accused has been in jail since 13th February 1997 till 15th February 1999 on account of the trial before the Session Court and thereafter in terms of the impugned judgment, which is totally bad in law. The appellant has been in custody and has been denied the right to liberty which every citizen is entitled to, since 15th February 1999 on the strength of an order which is totally bad. In these circumstances, we do not find any justifiable reason to remand the matter for re-trial. In our considered opinion, this is a fit case to quash the impugned judgment and to acquit the appellant.

16. As regards the contentions sought to be raised regarding necessity to review the structure of fees payable to the advocates appearing under legal aid services, we are undoubtedly in agreement with the advocate for

the appellant considering the fact that such fees were fixed in the year 1997 and we are already in 2007. Taking into consideration overall circumstances, it needs to be reviewed and restructured by the competent authorities. We hope and trust that the competent authorities will take appropriate decision in that regard, as expeditiously as possible.

17. As regards action to be taken against the advocates appointed on Legal Aid Panel failing to perform their duties, on being appointed to represent the accused, certainly it is always in the discretion of the court to order to strike off the name of an advocate from the pannel on account of his/her failure to perform his/her duties. There is no need to give any further direction in that regard.

18. Before parting with the matter we place on record our appreciation for the assistance rendered by the learned advocate Kum. Rebeca Gonsalves appearing on behalf of appellant. Indeed within two weeks from her appointment as an advocate for the appellant, she was able to

spare her time and to make herself available in getting the matter disposed of expeditiously wherein on account of an irregularity committed by the Session Court in the process of recording of evidence, the valuable statutory right was denied to the appellant which has resulted in great prejudice to the appellant. Therefore, in our considered opinion, apart from the regular remuneration payable under Legal Aid Services, we direct the State Government to pay further fees of Rs.5,000/- to Kum. Rebeca Gonsalves, advocate for the appellant. The State Government shall pay such fees within a period of six weeks.

19. For the reasons stated above therefore, while allowing the appeal, we hereby set aside the impugned judgment and order to the extent of conviction and sentence of the appellant and order his acquittal. He shall be released forth with if not required in any other matter.

Sd/-
[R.M.S. KHANDEPARKAR, J.]

Sd/-
[A. A. SAYED, J.]